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In The

Supreme Court of the United States

GEORGE REPKING, ADMINISTRATOR OF THE ESTATE OF CHRISTINA SPRINGS, and KELLY REPKING, on behalf of herself and her minor daughter, PAIGE GARNER,

Petitioners,

v.

BRAD LOKEY and RANDY REED,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arkansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), this Court appeared to set up a state-created danger cause of action under the Due Process Clause of the Fourteenth Amendment. Most all of the federal circuit courts of appeals have formulated some variation of the state-created danger test pursuant to *DeShaney*. In this case, the Supreme Court of Arkansas agreed with the Eighth Circuit Court of Appeals that the proper test included five elements, the last being that the conduct of the state actor must shock the conscience of the court. This fifth element is due to this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). The Ninth Circuit Court of Appeals created a circuit split when it ruled that *Lewis* is not applicable to state-created danger cases and that these cases should be analyzed under the deliberate indifference standard.

THE QUESTION PRESENTED IS:

Whether a trial court must always make an analysis of the shocks the conscience culpability standard announced in *Lewis* when deciding the proper elements of a state-created danger case brought under the Due Process Clause of the Fourteenth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners George Repking, Kelly Repking and Paige Garner respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Arkansas.

OPINIONS BELOW

The trial court's ruling is unpublished and reproduced at Pet. App. 19. The opinion of the Supreme Court of Arkansas dismissing the complaint is published at 2010 Ark. 356, 2010 WL 3787823 and is reproduced at Pet. App. 1.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on September 30, 2010. This court has jurisdiction pursuant to 28 U.S.C.A. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part: "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."

42 U.S.C.A. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

On the morning of January 21, 2005, Christina Springs was beaten and stabbed to death by her estranged husband Thomas Springs. He is currently on death row for this murder. His conviction and death sentence have been upheld on appeal. *Springs v. State*, 368 Ark. 256 (2006), *cert. denied*, 550 U.S. 939 (2007).

Christina Springs was living at the battered woman's shelter because of the violent behavior of Thomas Springs. Her daughter Chantelle Norwood called and told her that Thomas Springs was trying to take her boys from their school. Christina Springs believed that she had court ordered custody of these children. Christina Springs was driven to the school by her sister Kelly Repking,

When Christina Springs arrived at the school, Thomas Springs was still there, as was Fort Smith Police Officer Brad Lokey. Officer Lokey attempted to find out who had custody of the children and he ultimately told Thomas Springs to leave without the children. The children went into the school for the day.

Prior to Officer Lokey telling Thomas Springs to leave, Chantelle Norwood informed Officer Lokey that Thomas Springs had just moments before threatened to kill Christina Springs. She also told Officer Lokey that Thomas Spring had been in prison for beating Christina Springs in the past.

Christina Springs was terrified of Thomas Springs and all three women voiced their need for immediate protection from Thomas Springs. Officer Lokey told Christina Springs that he would get her back to the battered woman's shelter "safely." (First Amended Complaint, Pet. App. 34, Affidavit of Kelly Repking, Pet. App. 44, Affidavit of Chantelle Norwood, Pet. App. 50.) Officer Lokey was driving a standard marked police car. He did follow the vehicle driven by Kelly Repking, and occupied by Christina Springs, for a short distance from the school back toward the battered woman's shelter. The trip between the two places was about four miles.

A short time after leaving the school, Officer Lokey, without any warning to the women, quit following them. A short time later, at a very busy intersection, Thomas Springs rammed his car into

Ms. Repking's car, disabling her car. Thomas Springs then got out of his vehicle, came to the passenger side of the Repking vehicle and proceeded to severely beat Christina Springs. He then went back to his vehicle, retrieved a knife, then went back and stabbed Christina Springs to death. Christina Springs never made it out of the car. Officer Lokey was not present. Bystanders subdued Thomas Springs until he could be arrested by other Fort Smith police officers.

The administrator of the estate of Christina Springs, her father George Repking, filed this 42 U.S.C.A. § 1983 suit in the Circuit Court of Sebastian County, Arkansas. Kelly Repking and her minor daughter Paige Garner joined.

After the Complaint was filed, depositions were taken of Officer Lokey and Chief of Police Randy Reed. The Defendants then moved for summary judgment on all issues. As part of the response to the motion for summary judgment, Chantelle Norwood and Kelly Repking filed affidavits concerning the facts surrounding the murder of Christina Springs. The circuit court heard oral argument and then granted the Defendants' motion for summary judgment. (Pet. App. 21-28). The Repkings then appealed through the Arkansas court system, and the Supreme Court of Arkansas affirmed the trial court's dismissal of the case on September 30, 2010. (Pet. App. 1-18)

The basis of the Complaint was that Officer Lokey had failed to provide the police protection that he promised and that directly resulted in the murder

of Christina Springs on January 21, 2005. The circuit court and the Supreme Court of Arkansas ruled that as a matter of law Officer Lokey's conduct was mere negligence and would not support a 42 U.S.C.A. § 1983 cause of action under the state-created danger theory.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), this Court held that government actors generally have no duty to protect individuals from criminal acts by third parties. *DeShaney* never specifically created a cause of action under the Due Process Clause of the Fourteenth Amendment for a "state-created danger" exception to the rule above. This cause of action has been a creature of the various federal courts of appeals based upon *DeShaney*. The fundamental problem presented by this case is exactly what is the standard for this cause of action, both as to the elements and the standard of culpability? Unfortunately, the federal circuit courts of appeals are not in agreement on the answer to that question.[1]

[1] State Created Danger or Similar Theory as Basis for Civil Rights Action under 42 U.S.C.A. § 1983, 159 ALR Fed. 37; Cause of Action for State Created Danger Under 42 U.S.C.A. § 1983, 21 COA2d 175; Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 Touro L. Rev. 1 (2007).

The Petitioner filed this 42 U.S.C.A. § 1983 case in Arkansas state court alleging that a police officer promised the deceased police protection, reneged on that promise, and that action directly led to her murder. The trial court ruled at the summary judgment stage that, even if all the facts alleged in the complaint and the affidavits were true, no cause of action was stated under the state-created danger test pursuant to *DeShaney*. The Supreme Court of Arkansas affirmed the dismissal of the complaint for the same basic reasons stated in the trial judge's memorandum order.

The trial court and the Supreme Court of Arkansas ruled that the applicable standard in a state-created danger case is the test announced by the Eighth Circuit Court of Appeals in *Hart v. City of Little Rock*, 432 F.3d 801 (8th Cir. 2005). Under *Hart*, to establish a substantive due process violation under the fourteenth amendment, a plaintiff must show 1) membership in a limited, precisely definable group; 2) the conduct of state or local officials put them at significant risk of serious, immediate, and proximate harm; 3) the risk was obvious or known to the state or local government; 4) the officials acted recklessly in conscious disregard of the risk; and, 5) in total, the conduct shocks the conscience. *Id.* at 805. The trial court relied upon element number five (5) when stating that Officer Lokey's actions were mere negligence and could not therefore shock the conscience of the court. (Pet. App. 26) The Arkansas Supreme Court agreed, stating that it failed to see a genuine

issue of material fact that "Officer Lokey's conduct put Christina at significant risk of serious, immediate, and proximate harm and that he acted recklessly in conscious disregard of the risk as to shock our conscience." (Pet. App. 12). This ruling defies the facts alleged in the First Amended Complaint and the supporting affidavits.

The complaint and the affidavits show that Officer Brad Lokey knew the following:

a. Thomas Springs was a convicted felon who had done prison time for assaulting and battering Christina Springs in the past; (Pet. App. 43)

b. Thomas Springs had just threatened to kill Christina Springs; (Pet. App. 43)

c. Christina Springs was afraid of Thomas Springs; (Pet. App. 43)

d. Thomas Springs was at the school attempting to take out one of the children when he had no legal authority to do so; (Pet. App. 43)

e. Christina Springs was living at the battered woman's shelter; (Pet. App. 43)

f. She had an order of protection against him; (Pet. App. 49) and

g. Thomas Springs created a scene at the school by cussing and yelling. (Pet. App. 49).

The trial court, and the Supreme Court of Arkansas, ruled that even if Officer Lokey knew all these facts, his failure to follow Christina Springs from the school was not a violation of the state-created danger exception found in *DeShaney*. Officer Lokey's affirmative promise of police protection did not shock the conscience of the court pursuant to *Hart*. The most basic issue was that Officer Lokey did not put Christina Springs at significant risk of serious, immediate, and proximate harm. (Pet. App. 12)

There are two basic problems with this finding and analysis. Officer Lokey did not just promise to follow Christina Springs back to the battered woman's shelter, he promised to get her back there "safely." The second problem is that the Arkansas courts used the wrong legal standard for determining if the proof supported a state-created danger cause of action.

The Complaint alleges, and the affidavits support, the fact that Officer Lokey promised to get Christina Springs back to the battered woman's shelter "safely." There has never been a reported case with such a specific promise by a law enforcement officer to a citizen. Officer Lokey promised to get Christina Springs from Point A to Point B "safely." This is a much higher level of promised action than is reflected in the Supreme Court of Arkansas opinion.

The proof was that Christina Springs would have never left the school without some level of protection from Thomas Springs. If Officer Lokey had

not promised to get them all back to the battered woman's shelter safely, they would have taken the necessary alternative steps to get protection for themselves. (Pet. App. 45, para. 15) Once they left the school, they did not have a weapon to defend themselves or a cell phone to call for help. (Pet. App. 45) They all detrimentally relied on Officer Lokey's promise of police protection and Thomas Springs was allowed to carry out his threat to kill Christina Springs.

The Supreme Court of Arkansas used the state-created danger test found in *Hart*. The Petitioner argued that the correct test is found in *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (2006). *Hart* and *Kennedy* cannot be reconciled because the *Kennedy* ruling is that *County of Sacramento v. Lewis* does not apply to state-created danger cases like Petitioners'.

I. THE FEDERAL CIRCUIT COURTS OF APPEALS DO NOT HAVE A UNIFIED TEST FOR A STATE-CREATED DANGER CASE WHICH HAS LED TO A SPLIT BETWEEN THE EIGHTH AND NINTH CIRCUITS

The Eighth Circuit enunciated a five-part test listed above. This creates a direct conflict between the tests used by the Eighth and Ninth Circuits. Now that the Supreme Court of Arkansas has sided with the Eighth Circuit, there is also a conflict between a federal circuit court of appeals and a state supreme court.

Other examples of different multi-part state-created danger tests are found in the following three cases:

(1) *Estate of Smithers v. City of Flint*, 602 F.3d 758 (6th Cir. 2010)

> A state-created danger claim has three elements: (1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have know that its actions specifically endangered the plaintiff. . . . As it is difficult to determine whether an officer's behavior amounts to affirmative conduct or not, we have focused on "whether [the victim] was safer before the state action than he was after it."

602 F.3d at 763;

(2) *Sanford v. Stiles*, 456 F.3d 298 (3rd Cir. 2006)

> The state-created danger theory is now widely recognized. Although the Supreme Court had not yet explicitly adopted it, a majority of our sister circuits have implemented some variation of the theory. To prevail on a state-created danger claim in the Third Circuit, a plaintiff must prove the following four elements: (1) the harm ultimately caused was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks

> the conscience; (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all; and

(3) *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (2006)

> . . . after surveying the standards of our sister circuits, we made clear that the standard in this circuit was not gross negligence but "deliberate indifference to a known, or so obvious as to imply knowledge of, danger." We explicitly said that such a mental state "is enough" – no more, no less. Moreover, we refused to parse it further, explaining, "[w]e have not added a requirement that the conscience of the federal judiciary be shocked by deliberate indifference, because the use of such subjective epithets as 'gross' 'reckless' and 'shocking' sheds more heat than light on the thought process courts must undertake in cases of this kind."

439 F.3d at 1064.

The shocks the conscience doctrine found in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) presents the hurdle that the Supreme Court of Arkansas used to justify dismissing the complaint in

this case. *Lewis* demonstrates the difference between shocks the conscience and deliberate indifference. The complaint should not have been dismissed under either standard.

Lewis was a case of a police officer who was involved in a high-speed vehicle chase. The officer was in an emergency situation and did not have an extended time to deliberate over his actions. *Lewis* acknowledges that the shocks the conscience standard varies based up the facts of each case. *Lewis* does not stand for the proposition that the shocks the conscience standard applies in all state-created danger cases. If the state actor has sufficient time to deliberate over what course of action should be taken, then the proper standard of culpability is deliberate indifference, and not the shock the conscience standard.

In the present case, Officer Lokey was at the school trying to figure out who had custody of the Springs children. He then determined that Thomas Springs could not take the child and told him to leave the school. Officer Lokey then talked with Christina Springs and he then determined that he would follow her from the school back toward the battered woman's shelter to make sure that Thomas Springs was not following her. His process of investigating the complaint about Thomas Springs, his discussions as to what course of action he would take, and then taking a least part of those actions is direct proof of the deliberations he conducted. This was not an emergency type situation the officer in *Lewis* was facing, so the shocks the conscience standard did not apply to the facts of this case. Deliberation was practical in this case and was actually done by Officer

Lokey. The proper standard that the Supreme Court of Arkansas should have used was the deliberate indifference standard.

Since *Lewis* was decided in 1998 and *Kennedy v. City of Ridgefield* was decided in 2006, it is obvious that the Ninth Circuit Court of Appeals does not feel that *Lewis* applies in state-created danger cases. Upon the denial of rehearing before an en banc court, eight of the circuit judges dissented and voiced the view that *Lewis* was the applicable law. Their position was that "where another party is the source of the danger, the state official cannot be held liable." 440 F.3d at 1094. The dissent went on to state that, "Because the court fails to abide by the Supreme Court's directive and has acted in a manner contrary to our established circuit precedent, creating substantial risk of liability for public servants through its unwarranted expansion of the state-created danger doctrine, I must respectfully dissent from the denial of rehearing this important case en banc." 440 F.3d at 1094.

The Petitioner argued that *Kennedy v. City of Ridgefield* was the proper test to be used in this particular state-created danger case. The Supreme Court of Arkansas specifically held that the *Hart* test from the Eighth Circuit Court of Appeals was the proper test. This was a misapplication of the shocks the conscience standard found in *County of Sacramento v. Lewis*.

The Petitioner's position is that "but for" Officer Lokey's promise of police protection, Christina Springs would not have been killed at the particular

time she was killed. There never was any allegation that Officer Lokey promised to forever keep Thomas Springs from killing Christina Springs. However, due to Officer Lokey's promise of police protection, Christina Springs lost the ability to provide for alternative avenues of protection from Thomas Springs the morning she was murdered. Officer Lokey's actions were an affirmative act and not a mere omission, or failure to act, as was the case in *DeShaney*.

There have been other cases where a police officer was held liable under the state-created danger theory for injury to individuals.[2] An example is found in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). In *Wood*, a woman was left stranded in a high-crime area after the police arrested the driver of the car in which she was riding. She was later raped. The appeals court ruled that the state-created danger theory applied because the officer had increased the

[2] There have been numerous cases decided in favor of plaintiffs with less favorable facts than are present in this case. *Munger v. City of Glasgow Police Department*, 227 F.3d 1082 (9th Cir. 2000) (police failed to take appropriate action to prevent intoxicated person from freezing to death); *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996) (police officer encountered an intoxicated pedestrian and failed to take necessary action to keep her from freezing to death); *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993) (police officer left intoxicated passenger in vehicle where the passenger drove the vehicle away killing a third party); *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001) (child should not have been taken from mother and given to abusive father by child protective services).

danger that she faced by being left in a high-crime area.

In *Okin v. Village of Cornwall-On-Hudson*, 577 F.3d 415 (2nd Cir. 2009), the court ruled that officers could be held liable under the state-created danger theory for failing to properly investigate allegations of a woman being harmed by her violent boyfriend. The court noted at 577 F.3d at 432, footnote 10, that 30% of women murdered between 1976 and 2005 were killed by intimate partners. In *Okin*, the officers were held liable for not properly investigating the woman's complaint of violence. In this case, Thomas Springs threatened to murder Christina Springs, had been in prison for beating her, and she was so scared of him that she was living in a battered woman's shelter. Officer Lokey knew that Christina Springs, Kelly Repking, and Paige Garner were in potential danger because he agreed to follow them from the school back to the battered woman's shelter. Why else would he have wasted his time if he did not believe that violence was a clear possibility if Thomas Springs caught up with Christina Springs, Kelly Repking, and Paige Garner?

II. ONLY A DECISION FROM THE SUPREME COURT OF THE UNITED STATES WILL REMEDY THE PROBLEMS PRESENTED BY THIS CASE

If there is a more factually hideous state-created danger case than *Pinder v. Johnson*, 54 F.3d 1169

(4th Cir. 1995), Petitioner is unable find one. The facts in *Pinder* are remarkably close to Petitioner's case. In *Pinder*, three children died in an arson fire set by a man equally as dangerous as was Thomas Springs. The police in *Pinder* promised to keep the arsonist in jail overnight, and that induced the mother of the murdered children to go to work and leave them at home without necessary protection. The court ruled that the police officer was not liable under a state-created danger theory for failing to keep the arsonist in jail as he promised. Four judges of the en banc court dissented. Their view was that the police officer placed the children in danger by not following through with his promise to make sure that the arsonist was kept in jail. The arsonist had been convicted of trying to set the house on fire before, had recently just finished serving his sentence, and had threatened to murder the children's mother.

The Fourth Circuit is unlike the other circuits in that the court requires that a "special relationship" exists between the state and the individual before that person can properly allege a state-created danger case. The overriding concern is that if the actor committing the injury is a third party, then liability is foreclosed unless the person is basically in state custody. The Fourth Circuit therefore restricts the state-created danger cases in a manner inconsistent with the other federal circuits.

In *S.S. ex rel. Jervis v. McMullen*, 225 F.3d 960 (8th Cir. 2001), three judges dissented from the en banc courts finding that the state was not liable for

placing a child in a home where a child molester could attack her. The dissent stated that the facts showed a deliberate indifference that should shock the conscience of the court. 225 F.3d at 969. This is yet another example of where federal circuit judges are struggling with the meaning of *DeShaney* and the application of *Lewis* to state-created danger cases. This case presents a good opportunity for this Court to reconcile the different *DeShaney* elements tests and the application of the culpability standard as it relates to *Lewis*.

Since the federal courts of appeals have not agreed on the test to be used for a state-created danger lawsuit, coupled with the split between the Eighth Circuit and Ninth Circuits on the issue of the application of the shocks the conscience standard in *Lewis*, this court needs to intervene. Petitioner knows that this court is not a court of error in the typical sense, but the Supreme Court of Arkansas' decision in this case is a serious misapplication of the *Lewis* ruling and just adds another reason as to why the petition for certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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SUPREME COURT OF ARKANSAS
No. 09-1024

GEORGE E. REPKING, KELLY REPKING, ESTATE OF CHRISTINA SPRINGS, APPELLANTS, VS. BRAD LOKEY AND RANDY REED, APPELLEES,	**Opinion Delivered** 9-30-10 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, NO. CIV-08-92, HON. JAMES O. COX, JUDGE, AFFIRMED.

ROBERT L. BROWN, Associate Justice

The appellants in this case are George Repking, administrator of Christina Springs's estate and Kelly Repking on behalf of herself and her minor daughter, Paige Garner. The appellees are Brad Lokey, a patrolman with the Fort Smith Police Department, and Randy Reed, then Fort Smith Police Chief. The issues raised involve whether a summary judgment entered by the circuit judge correctly determined that the appellees are not liable under federal or state statutory or constitutional law. We hold that the judgment was correct, and we affirm.

On January 21, 2005, Christina Springs; her sister, Kelly Repking; and Ms. Repking's daughter drove to Sutton Elementary School in Fort Smith because Thomas Springs, Christina Springs's

husband, was attempting to remove one of the couple's six children from the school. Chantelle Norwood, the oldest daughter of Christina and Thomas, called Christina to the school after dropping off three of her brothers. At the time, Christina lived at the Battered Women's Shelter in Fort Smith. Christina also had several orders of protection against Thomas because of prior instances of violence.

That morning, Officer Brad Lokey was dispatched to the school. When Officer Lokey arrived, Thomas advised him that there was an order of protection outstanding. Officer Lokey was given three orders, dated January 5, 18, and 19, 2005, respectively. Unable to determine which order was in effect, Officer Lokey advised Thomas not to remove the child from the school. The child was later returned to the school.

After Thomas was told to leave the school property, Christina arrived with her sister and niece. Appellants assert that Officer Lokey then agreed to follow Christina and Ms. Repking back to the Battered Women's Shelter. Officer Lokey, however, testified by deposition that he only agreed to follow them for a short distance and not all the way back to the shelter. All parties agree that the Springs party left the school with Officer Lokey following. After determining that the vehicle was not being followed, Officer Lokey went to Kimmons Junior High School in Fort Smith to determine if Thomas had visited his children Officer Lokey believed to be enrolled at that school.

Christina and Ms. Repking continued driving toward the shelter. They traveled approximately four miles further to the intersection of Greenwood Street and Rogers Avenue in Fort Smith. At that intersection, Thomas saw Christina's vehicle and crossed opposing lanes of traffic in order to ram her vehicle. After ramming her car, he got out of his car, walked over to Christina's car, and began beating Christina. He then returned to his car and got a knife, which he used to stab Christina to death while she was still in the car. Ms. Repking and her daughter suffered injuries from the car accident but were not beaten or stabbed by Thomas.[1]

The appellants brought suit against Officer Lokey and Police Chief Reed under both federal and state constitutions, § 1983 of the United States Code, and the Arkansas Civil Rights Act. Specifically, they allege that Officer Lokey deliberately put Christina in harm's way. They further raise violations of the wrongful death and survival statutes. The circuit judge granted the appellees' motion for summary judgment after determining that there was no special relationship which created an affirmative duty to protect Christina from Thomas, that the police department had not created the danger, that there was no Ninth Amendment unenumerated right violated, and that the appellants, as individuals, were entitled

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[1] Thomas Springs was tried and convicted of capital murder and currently sits on death row. For the facts in that case, see *Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006).

to qualified immunity under state law as employees of a governmental entity.

The pertinent findings and conclusions in the letter opinion supporting the judgment follow:

> Plaintiff contends that Officer Lokey put Christina Springs in significant immediate harm by failing to arrest Thomas Springs and by failing to follow the Repking vehicle. Even if Officer Lokey should have arrested Thomas Springs and should have followed the vehicle to the Women's Shelter, his acts can only be described as negligent. The 8th Circuit Court of Appeals has held that "mere negligence can never be conscience-shocking and cannot support a claim alleging a violation of substantive due process rights."
>
> Furthermore, a plaintiff must usually show that the state actor intended to harm him, but in some cases, proof of deliberate indifference will satisfy the substantive due process threshold. In this situation, no pleading or affidavit on behalf of plaintiff alleges that either defendant intended to harm Christina Springs, nor does Officer Lokey's deposition reflect his observance of any behavior that would have required him to arrest Thomas Springs. While Officer Lokey could have followed the Repking vehicle to the Women's Shelter out of caution, his decision not to follow the car the entire four miles does not amount to a deliberate attempt to cause harm or act indifferently to Christina Springs' situation. Accepting all

> facts alleged in plaintiff's complaint and affidavits are true, the defendants' conduct does not rise to the level of malicious, willful or wanton behavior; therefore, there is no valid claim under 42 U.S.C. § 1983.

Appellants now assert on appeal that Officer Lokey and the City of Fort Smith, through then Police Chief Reed, are civilly liable for the death of Christina Springs.

I. Summary Judgment

The law is well settled regarding the standard of review used by this court in reviewing a grant of summary judgment. A trial court will grant summary judgment only when it is apparent that no genuine issues of material fact exist requiring litigation and that the moving party is entitled to judgment as a matter of law. *Brock v. Townsell*, 2009 Ark. 224, 309 S.W.3d 179, 185. The burden of proof shifts to the opposing party once the moving party establishes a prima facie entitlement to summary judgment, and the opposing party must demonstrate the existence of a material issue of fact. *Id.* After reviewing the undisputed facts, the trial court should deny summary judgment if, under the evidence, reasonable minds might reach different conclusions from the same undisputed facts. *Id.* On appeal, this court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party leave a material question of fact unanswered. *Id.* This court views the evidence in a light

most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* This review is not limited to the pleadings but also includes the affidavits and other documents filed by the parties. *Id.*; *see also* Ark. R. Civ. P. 56(c).

The issue of whether a party is immune from suit in a summary-judgment procedure is purely a question of law, and this court reviews that issue on appeal de novo. *City of Fayetteville v. Romine*, 373 Ark. 318, 321, 284 S.W.3d 10, 13 (2008); *Baldridge v. Cordes*, 350 Ark. 114, 85 S.W.3d 511 (2002).

II. Section 1983 Liability

Appellants contend that Officer Lokey is liable in his official capacity for what happened to Christina under federal statutory law. *See* 42 U.S.C. § 1983. To establish a violation of § 1983, the plaintiff must show that the deprivation (1) was a right secured by the United States Constitution and laws of the United States, and (2) was caused by a person or persons acting under the color of state law. *Tipler v. Douglas County, Nebraska*, 482 F.3d 1023 (8th Cir. 2007).

Local governing bodies can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. *Monell v. Dep't of Social Services*, 436 U.S. 658, 690 (1978).

Although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the United States Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision-making channels. *Id.* at 690-91. Generally, an isolated incident of police misconduct by subordinate officers is insufficient to establish municipal policy or custom. *Weidemeier v. City of Ballwin*, 931 F.2d 24, 26 (8th Cir. 1991). A custom or usage is demonstrated by:

> (1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; (2) deliberate indifference to or tacit authorization of such conduct by the governmental entity's policy-making officials after notice to the officials of that misconduct; (3) the plaintiff's injury by acts pursuant to the governmental entity's custom, i.e., proof that the custom was the moving force behind the constitutional violation.

Ware v. Jackson County, Mo., 150 F.3d 873 (8th Cir. 1998).

On January 21, 2005, Officer Lokey was a patrolman for the Fort Smith Police Department and had no policy-making authority at that time. The internal investigation "by the department" determined

that he had not violated department policy or procedure and that the department specifically did not have a policy authorizing police officers to provide private individual protection. The investigation further determined that had Officer Lokey engaged in misconduct or violated a policy, this one instance alone would not support municipal liability. Accordingly, as an initial matter, it does not appear that a custom or policy was involved in Officer Lokey's actions.

We turn then to the alleged constitutional violations. Appellants do not clearly define what constitutional right Officer Lokey allegedly deprived Christina of that day. They state that the thrust of their complaint is that Officer Lokey promised to provide police protection to Christina and then failed to provide that protection which led directly to the injuries. The United States Supreme Court has held that the Due Process Clause is not implicated by a *negligent* act of an official which causes an unintended loss of or injury to life, liberty, or property. *Daniels v. Williams*, 404 U.S. 327, 328 (1986). Moreover, the court has held that nothing in the language of the Due Process Clause itself requires a law enforcement officer to protect the life, liberty, and property of its citizens against invasion by private actors. *DeShaney v. Winebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). In *DeShaney*, the Court said:

> The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.

> It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. The Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. A State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

Id. at 195-197.

On the other hand, it is clear that Officer Lokey was under an obligation to arrest Thomas if a felony had been committed in his presence or if he had probable cause to believe a felony had been committed. Chantelle Norwood states that she informed Officer Lokey that Thomas threatened to kill Christina. Norwood did not hear Thomas make the threat. Rather, the threat was reported to Christina by Stephanie Gordon, a person on the scene who was speaking with Thomas. According to Gordon's affidavit, she told Christina that Thomas said he was going to kill Christina. Gordon states that Officer Lokey was not within earshot when she reported the threat, and Christina simply responded, "he says that all that time, he doesn't mean it." Gordon states she herself did not tell Officer Lokey about the threat.

Without question, had Officer Lokey heard Thomas make the threat, he would have been under a duty to arrest Thomas. However, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its "substantive" manifestations. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 768 (2005).

In short, even if Officer Lokey did know of the threat made by Thomas against Christina, based on second-hand information, his failure to arrest Thomas could not be the basis for liability. Officer Lokey was under no affirmative duty to aid or protect Christina from a private act of violence under the Due Process Clause, which means that clause cannot be the basis for liability under §1983. There is no basis for liability against Officer Lokey in his official capacity and certainly no basis for liability against Police Chief Reed as he was not personally involved in the incident. We hold that summary judgment was appropriate despite the factual dispute regarding Officer Lokey's knowledge of the threat.[2]

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[2] We note where the circuit judge looked at maliciousness as a factor for § 1983 liability. While it certainly is a factor under state immunity law, we do not find maliciousness to be a prerequisite for § 1983 liability under federal law or federal jurisprudence.

a. State-created danger

There is an exception to the absence of an affirmative right to safety under the Due Process Clause, and that is the "state-created-danger exception." Under this exception, there is a duty to protect when the state officers affirmatively place a particular individual in a position of danger that he or she would not otherwise have faced. *Davis v. Fulton County, Ark.*, 90 F.3d 1346, 1351 (8th Cir. 1996). For such a duty to protect to arise, the actions of the state must create a unique risk of harm to that person that is greater than the risk faced by the general public. *Id.* In the instant case, the appellants and appellees disagree as to what the correct test is for determining whether the state-created-danger exception is satisfied.

The United States Eighth Circuit Court of Appeals has adopted a five-part test for analyzing this exception. *See Hart v. City of Little Rock*, 432 F.3d 801 (8th Cir. 2005). Under *Hart*, a plaintiff must show 1) membership in a limited, precisely definable group, 2) the conduct of state or local officials put them at significant risk of serious, immediate, and proximate harm, 3) the risk was obvious or known to the state or local officials, 4) the officials acted recklessly in conscious disregard of the risk, and 5) in total, the conduct shocks the conscience. *Id.* at 805. The trial court followed the *Hart* criteria in the instant case.

Appellants point to a Ninth Circuit Court of Appeals case, which does not include the shock-the-conscience element as the more correct test. *See Kennedy v. City of Ridgefield, Wash.*, 439 F.3d 1055 (9th Cir. 2006). We disagree and find that the *Hart* test, which includes the shock-the-conscience element, is the more appropriate test for this analysis. Accordingly, we hold that the circuit judge was correct to follow it. We further hold that Officer Lokey's actions regarding Christina's safety, even accepting all of the facts in favor of the appellants, did not exhibit deliberate indifference to her plight so as to implicate due-process concerns. Stated differently, we fail to see a genuine issue of material fact that has been presented that Officer Lokey's conduct put Christina at significant risk of serious, immediate, and proximate harm and that he acted recklessly in conscious disregard of the risk so as to shock our conscience. Accordingly, the *Hart* test for a state-created danger is not satisfied, and the summary judgment stands.

III. Arkansas Civil Rights Act

Appellants contend that the circuit judge failed to distinguish the Arkansas Civil Rights Act from § 1983 under the federal civil rights act. The appellants further contend that the circuit judge used the wrong standard in analyzing the appellees' immunity under the state act. The circuit judge determined that Officer Lokey and Chief Reed both had immunity

under Arkansas Code Annotated section 21-9-301 and that their acts were not malicious. He said:

> Additionally, both defendants are employees of governmental entities and are thus entitled to qualified immunity. Under A.C.A. § 21-9-301, a state employee is immune from liability unless the acts occurred within the scope of their employment and the acts were malicious. Neither Chief Reed nor Officer Lokey acted maliciously in regard to Christina Springs' request for aid; therefore, they are both immune from liability.

Appellants argue that the trial court conflated section 19-10-305(a) with section 21-9-301(a). Those two statutes read as follows:

> (a) Officers and employees of the State of Arkansas are immune from liability and from suit, except to the extent that they may be covered by liability insurance, for damages for acts or omissions, other than malicious acts or omissions, occurring within the course and scope of their employment.

Ark. Code Ann. § 19-10-305(a) (2007).

> (a) It is declared to be public policy of the State of Arkansas that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies shall be immune from liability and from suit for damages

> except to the extent that they may be covered by liability insurance.

Ark. Code Ann. § 21-9-301(a) (2004).

This court has consistently held that section 21-9-301 provides city employees with immunity from civil liability for negligent acts, but not for intentional acts. *See, e.g.*, *City of Fayetteville v. Romine*, 373 Ark. 318, 321, 284 S.W.3d 10, 13 (2008). Under section 21-9-301, the city and its employees enjoy immunity from liability and from suits for damages except to the extent that the city is covered by liability insurance, or acts as a self-insured for certain amounts as provided by statute. *City of Farmington v. Smith*, 366 Ark. 473, 478, 237 S.W.3d 1, 5 (2006).

We agree with appellants that section 21-9-301(a) does not include a maliciousness element and that it clearly cites an exception as to immunity to the extent of liability insurance. Thus, according to the appellants, the negligent acts of Officer Lokey may be actionable to the extent of liability coverage. We further agree with the point raised by appellants on appeal that when a defendant pleads an affirmative defense of immunity that defendant must plead and prove no liability coverage under this section for purposes of summary judgment. *See, e.g.*, *Vent v. Johnson*, 2009 Ark. 92, 303 S.W.3d 46.

The problem with the appellants' negligence/insurance argument is that it was not made to the trial judge, but it is raised for the first time on appeal. It necessarily follows that the appellants did not

obtain a ruling on this point from the circuit judge. The entire emphasis of the appellants' argument before the circuit judge was that Officer Lokey's actions went beyond mere negligence and rose to the higher standard of deliberate indifference. Hence, the negligence/insurance point is not preserved.

Moreover, regarding the point that appellees did not address the Arkansas Civil Rights Act, we disagree. The appellants raised section 16-123-105 of the Arkansas Civil Rights Act as a basis for liability in their complaint. Subsection (c) of that statute states that courts may look to § 1983 and federal and state court decisions interpreting the federal statute "for guidance" in interpreting section 16-123-105. *See also Fegans v. Norris*, 351 Ark. 200, 89 S.W.3d 919 (2002). The circuit judge clearly did so. We have already held in this opinion that no § 1983 violation exists. Similarly, using the Eighth Circuit case of *Ware v. Jackson County, Missouri,* 150 F.3d 873 (8th Cir. 1998), we find no widespread pattern of unconstitutional misconduct that would give rise to an Arkansas Civil Rights Act violation.

We hold that there is no reversible error on the point raised that the circuit judge failed to distinguish between § 1983 and the Arkansas Civil Rights Act.

IV. The Ninth Amendment

Appellees argue, as a final point, that the "rights to life and safety" are unenumerated rights "retained

by the people" under the Ninth Amendment to the United States Constitution. While there may be an interesting scholarly debate about the rights preserved under the Ninth Amendment, the facts before us do not compel resolution of whether there is a right to law enforcement protection under facts comparable to the facts of the case at hand. Appellants do cite a plethora of scholarly articles supporting the proposition that the Ninth Amendment includes the unenumerated right to survival. But more is required in the way of authority for this court to determine whether the scope of the Ninth Amendment embraces a right protected by the United States Constitution premised on promises of safety and protection. We have often stated that we will not develop an issue for a party on appeal. *See Alexander v. McEwen*, 367 Ark. 241, 239 S.W.3d 519 (2006). This point is without merit.

Affirmed.

SHEFFIELD, J., concurs.

SHEFFIELD, J., concurring. Although I concur with the result, I would adopt the Ninth Circuit's test that eliminates the "shocks the conscience" element when assessing an alleged state-created danger. The five-part test adopted by the Eighth Circuit is so subjective and difficult to apply that it has rendered the state-created-danger doctrine meaningless. As the majority stated, the five elements of the state-created-danger doctrine are: 1) membership in a

limited, precisely definable group, 2) the conduct of state or local officials put them at a significant risk of serious, immediate, and proximate harm, 3) the risk was obvious or known to the state or local officials, 4) the officials acted recklessly in conscious disregard of the risk, and 5) in total, the conduct shocks the conscience. The first four factors should be retained, but I would not require the final element.

An example that clearly illustrates this point is found in the case *S.S. v. McMullen*, 225 F.3d 960 (8th Cir. 2000) (en banc). In that case a child was released from state custody and returned to her father, even though the Missouri Division of Family Services knew that the father was allowing the child to have contact with a known pedofile named Joel Griffis. *Id.* at 962. Griffis himself contacted the child's social worker (after the social workers knew his history) and stated that he thought it would be unfair for his contact with the child to be limited. *Id.* at 965 (Gibson, J., dissenting). The child's foster mother told the social workers that the child stated that "she humps with her daddy, Jon" and that she had exhibited inappropriate sexual behaviors numerous times. *Id.* Less than three months after the child was released to her father, Griffis molested her. *Id.* at 966.

The Eighth Circuit, sitting en banc found that the social workers' action in returning the child did not shock the conscience because it amounted to gross negligence. *Id.* at 964. Three judges dissented, stating that the defendant social workers engaged in "reflections upon the risk to which they willfully subjected"

the child and that this amounted to a deliberate indifference that should shock the conscience of any court. *Id.* at 969.

If the facts in the *S.S.* case do not shock the conscience of a court, then almost nothing will. In fact, I have been unable to locate any case in which the Eighth Circuit's conscience was shocked. I agree with the Ninth Circuit that language such as "shocks the conscience" is too subjective to be helpful in analyzing an alleged state-created danger. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1064-65 (9th Cir. 2006).

I do, however, agree with the majority that Officer Lokey's conduct did not put Christina at significant risk of serious, immediate, and proximate harm.

Accordingly, I concur in the result.

IN THE CIRCUIT COURT OF
SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DISTRICT
CIVIL DIVISION I

GEORGE E. REPKING,
ADMINISTRATOR OF THE ESTATE OF
CHRISTINA SPRINGS, and KELLY REPKING
on behalf of herself and her minor
daughter Paige Garner PLAINTIFFS

V. CASE NO. CV-2008-92

BRAD LOKEY and
RANDY REED, each in their individual and
official capacity DEFENDANTS

ORDER

(Filed Jun. 4, 2009)

Now on this 4th day of June, 2009 this cause comes on for decision, a hearing on defendant's motion for summary judgment having been held previously. The Court, having had heard arguments of counsel and having the benefit of briefs by counsel finds as follows:

1. That this Court has jurisdiction of the subject matter and parties herein, and venue is proper in this County and District.

2. There are no material facts in dispute, and defendants are entitled to summary judgment as a matter of law.

3. That the Court's memorandum opinion is incorporated herein by reference.

5. That each party will pay their own attorney fees and costs.

IT IS SO ORDERED.

/s/ James O. Cox
JAMES O. COX
Sebastian County Circuit
Judge

[SEAL]

James O. Cox
CIRCUIT JUDGE DIVISION VI
TWELFTH JUDICIAL DISTRICT

SEBASTIAN COUNTY COURTHOUSE
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June 4, 2009

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Re: George Repking, et al. v. Brad Lokey
and Randy Reed
Sebastian County Circuit Court,
Fort Smith District
Case No. CV-2008-92(I)

Dear Counselors:

I appreciate the excellent presentation of the facts in this difficult case as well as your briefs in regard to Defendant's Motion for Summary Judgment.

The material facts of this case are as follows:

1. Christina Springs was murdered by her husband, Thomas Springs, on January 21, 2005. Thomas Springs was convicted of capital murder and sentenced to the death penalty. Brad Lokey was employed as a patrolman by the Fort Smith Police Department, and Randy Reed served as the Chief of the Police Department for the City of Fort Smith.

2. The couple had six children together during their turbulent relationship. At the time of the murder, Christina Springs was living at the Battered Women's Shelter in Fort Smith because of Thomas Springs' previous violent behavior toward her. Additionally, Christina Springs had an order of protection issued against Thomas Springs.

3. On January 21, 2005, Christina Springs, accompanied with her sister, Kelly Repking, and her niece, Paige Garner, went to Sutton Elementary School due to a report that Thomas Springs was attempting to remove one of the couple's children from the school. The call was made by Thomas and Christina Springs' oldest daughter, Chantelle Norwood, who was taking three of her brothers to school that morning.

4. Officer Lokey was dispatched to Sutton Elementary. He was advised by Thomas Springs and Charles Shipman, the principal of the school, that an order of protection had been issued between Thomas and Christina Springs. There were three separate orders, dated January 5, 18 and 19. The January 5 order prohibited Thomas Springs from going onto property where his children attended school. Officer Lokey could not determine which order was in effect at the time, and he advised Thomas Springs that he could not remove his child from school because he had no visitation order, that he should let the Court resolve the matter and that he could be arrested if the order of January 5 was in effect. The son who had been removed from the school by Thomas Springs was later returned.

5. After Thomas Springs was told to leave the school's property, Officer Lokey was approached by Christina Springs and Kelly Repking. He informed the two women that Thomas Springs had left the property. He then offered to follow Kelly Repking's vehicle. After following the women for a short

distance, Officer Lokey went to nearby Kimmons Junior High School to make sure Thomas Springs did not attempt to remove one of his children from that school.

6. Later, about four miles away from the point where Officer Lokey stopped following the Repking vehicle, Thomas Springs rammed into the Repking vehicle and caused a serious accident in a busy intersection. Thomas Springs then beat and stabbed Christina Springs to death while she was still in the car. Kelly Repking and her daughter suffered serious injuries as a result of the car accident but were not stabbed by Thomas Springs.

7. As a result of the murder of Christina Springs, an internal investigation was conducted by the Fort Smith Police Department to determine whether appropriate procedures were followed. At the conclusion of the investigation, it was determined that no violations of policy or procedure had been made by Officer Lokey or any other member of the Fort Smith Police Department. The inquiry specifically found that Thomas Springs did not commit any felony or misdemeanor in Officer Lokey's presence which would have allowed Officer Lokey to arrest Thomas Springs at Sutton Elementary.

The applicable law in this case is as follows:

To establish liability for a civil rights action under 42 U.S.C. §1983, a plaintiff must show that (1) a constitutional right has been violated, (2) the violation was committed by a state actor and (3) the state

actor possessed the requisite culpability and causation to violate the constitutional right. *Hart v. City of Little Rock*, 432 F.3d 801, 804 (8th Cir. 2005).

Arkansas has codified the federal Civil Rights Act under A.C.A. 16-123-105. There is little precedent for claims under the Arkansas Civil Rights Act, and therefore, state courts may look to state and federal decisions which interpret the federal civil rights laws which can be used for persuasive authority and guidance. *Faulkner v. Arkansas Children's Hospital*, 347 Ark. 941, 954 (2002).

In this case, plaintiff claims violations of the Fifth, Fourteenth and Ninth Amendments. The United States Supreme Court has held that the Due Process Clause of the Fifth Amendment of the Constitution forbids the State from depriving an individual of life, liberty or property without "due process of law" but has not imposed an affirmative obligation on the State to ensure that those interests do not come to harm from other means. *Deshaney v. Winnebago County Department of Social Services, et al.*, 109 S.Ct. 998, 1003 (1989).

The United States Supreme Court has also held that the purpose of the Due Process Clause of the Fourteenth Amendment of the Constitution is to protect citizens from the State but not to ensure that the State protects a citizen from harm done by another citizen. *Id.* at 1003. This clearly applies to the situation at hand, as Thomas Springs was a private actor and not employed by the State.

There are two exceptions to the Fourteenth Amendment rule that the State has no affirmative duty to aid a citizen. First, the state has an affirmative duty to protect when a "special relationship" exists between the State and an individual. *Id.* at 1000. The second is that the State has an affirmative duty to protect an individual if the State created the danger to which the individual is being subjected. *Hart*, 432 F.3d at 805.

To prove a special relationship exists between the State and an individual, a person must show (1) the State look some affirmative action that increased the risk of harm to that person and (2) the State's action was specifically directed toward that person such that the increase in the risk of harm was greater than that faced by the general public. *Davis v. Fulton County, Ark.*, 884 F. Supp. 1245.

Plaintiff argues that Officer Lokey's failure to follow the Repking vehicle all the way to the Women's Shelter constitutes an affirmative action on behalf of the State that increased plaintiff's risk of harm. However, even if Officer Lokey was following the two women, the incident still could have occurred. He had no control over Thomas Springs, and the eventual murder of Christina Springs in a busy intersection could not have been foreseen.

To prove a danger was state-created, a person must show (1) that he was a member of a limited, precisely definable group, (2) the state actor's conduct put him at significant risk of serious, immediate and

proximate harm, (3) the risk was obvious or known to the state actor, (4) the state actor was recklessly in conscious disregard of the risk and (5) the conduct shocks the conscience. *Hart*, 432 F.3d at 805.

Plaintiff contends that Officer Lokey put Christina Springs in significant immediate harm by failing to arrest Thomas Springs and by failing to follow the Repking vehicle. Even if Officer Lokey should have arrested Thomas Springs and should have followed the vehicle to the Women's Shelter, his acts can only be described as negligent. The 8th Circuit Court of Appeals has held that "mere negligence can never be conscience-shocking and cannot support a claim alleging a violation of substantive due process rights." *Id.* at 805.

Furthermore, a plaintiff must usually show that the state actor intended to harm him, but in some cases, proof of deliberate indifference will satisfy the substantive due process threshold. *Id.* at 806. In this situation, no pleading or affidavit on behalf of plaintiff alleges that either defendant intended to harm Christine Springs, nor does Officer Lokey's deposition reflect his observance of any behavior that would have required him to arrest Thomas Springs. While Officer Lokey could have followed the Repking vehicle to the Women's Shelter out of caution, his decision not to follow the car the entire four miles does not amount to a deliberate attempt to cause harm or act indifferently to Christina Springs' situation. Accepting all facts alleged in plaintiffs' complaint and affidavits are true, the defendants' conduct does not rise

to the level of malicious, willful or wanton behavior, therefore, there is no valid claim under 42 U.S.C. §1983.

The Ninth Amendment provides that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. *U.S. Const. amend. IX.* Plaintiffs contend they possess some right which is not specifically listed within the Constitution; however, that right was not explicitly stated by plaintiffs. Furthermore, the Ninth Amendment has "never been held to encompass a substantive right to be free from bodily harm or to adequate police protection." *Hartman v. Bachert*, 880 F. Supp. 342, 345 (1995). Therefore, plaintiffs' claim under the Ninth Amendment is without merit.

Additionally, both defendants are employees of governmental entities and are thus entitled to qualified immunity. Under A.C.A. § 21-9-301, a state employee is immune from liability unless the acts occurred within the scope of their employment and the acts were malicious. Neither Chief Reed nor Officer Lokey acted maliciously in regard to Christina Springs' request for aid; therefore, they are both immune from liability.

For the reasons set out above, plaintiffs' complaint should be dismissed.

Best personal regards.

Cordially,

/s/ James O. Cox
James O. Cox

cc: Sebastian County Circuit Clerk

IN THE CIRCUIT COURT OF
SEBASTIAN COUNTY, ARKANSAS
FORT SMITH, ARKANSAS
VI

GEORGE E. REPKING, ADMINISTRATOR OF THE ESTATE OF CHRISTINA SPRINGS, and KELLY REPKING on behalf of herself and her minor daughter Paige Garner,	)	
PLAINTIFFS	)	No. CV-08-92
V.	)	
BRAD LOKEY AND RANDY REED, each in their individual and official capacity,	)	
DEFENDANTS	)	

FIRST AMENDED COMPLAINT

Comes now the Plaintiffs and for their First Amended Complaint doth state and allege as follows:

PARTIES

1. George E. Repking is the father of Christina Springs and the Administrator of her estate per the Letters of Administration of the Person and the Estate entered on January 14, 2008, in the Circuit Court of Sebastian County, Arkansas. George E. Repking is a resident of Sebastian County, Arkansas.

2. Kelly Repking is an adult female residing in Sebastian County, Arkansas.

3. Paige Garner is the minor child of Kelly Repking and resides with her mother.

4. George E. Repking, as Administrator of the Estate of Christina Springs sues on behalf of himself and all other statutory heirs as administrator and personal representative of the estate. The statutory heirs are George E. Repking, Chantelle M. Norwood, Matthew T. Mooring, Joshua A. Mooring, Jacob T. Springs, Michael A. Springs, Daniel S. Springs, Heather Mooring, Laura S. Eagle, Kelly J. Repking, Ashley L. Repking, and Brittany M. Myers. If for any reason George Repking is found not to be the proper person to sue, the statutory heirs sue in their own individual capacities.

5. At the time of the acts or omissions that are the subject of this Complaint, Defendant Brad Lokey was a police officer for the City of Fort Smith, Arkansas. Defendant Randy Reed was the Chief of Police for the City of Fort Smith, Arkansas. As Chief of Police, Defendant Randy Reed was the chief policy-maker for the City of Fort Smith, Arkansas, on all issues related to the operation, supervision, and training of all employees for the City of Fort Smith, Arkansas, police department.

6. Each defendant is sued in his individual and official capacity.

JURISDICTION & VENUE

7. This action arises under Title 42 U.S.C. Secs. 1983 & 1988, for violation of the Federal Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. Subject matter jurisdiction and venue of this action are in the Circuit Court of Sebastian County due to the fact that all acts or omissions and events related below occurred in Sebastian County on or about January 21, 2005. This same subject matter jurisdiction and venue covers all other causes of action listed below.

FACTS

8. On or about January 21, 2005, Christina Springs was murdered by her husband, Thomas Leo Springs. This murder occurred in Fort Smith, Arkansas. Mr. Springs was convicted of the capital murder of Ms. Springs and was sentenced to death. He currently is on death row at the Arkansas Department of Corrections. This case was reported as *Springs v. State*, 368 Ark. 256 (December 7, 2006). Ms. Springs was 41 at the time of her death.

9. In the same case, Mr. Springs was convicted of felony aggravated assault on both Kelly Repking, (Ms. Springs sister), and Ms. Repking's then three-year-old daughter Paige Garner. Mr. Springs was sentenced to six years in prison for each of those crimes.

10. Christina Springs and Thomas Springs had been married for many years and they had numerous biological children. The children were at the time of the murder: 1) Chantelle, age 17; 2) Matthew, age 15; 3) Joshua, age 12; 4) Jacob, age 11; 5) Michael, age 9; 6) Daniel, age 8. [Chantelle is now a married adult and her last name is Norwood.]

11. The Springs' marriage was tumultuous. Thomas Springs, from time-to-time, was a very manipulative, threatening and a physically violent man toward the members of his family. He had previously been put in state prison in Arkansas for assault and battery on Ms. Springs.

12. At the time of her death, Ms. Springs was living at the Battered Woman's Shelter in Fort Smith due to Mr. Springs' threatening and violent behavior. She had an order of protection issued against him that was issued just two days prior to her murder. She also had a court order giving her sole custody of all the children.

13. On or about January 21, 2005, Ms. Springs went to Sutton Elementary School because of a report that Mr. Springs was attempting to take one of the children from the school. Due to the situation, Fort Smith Police Officer Brad Lokey arrived at the scene. Shortly thereafter, Ms. Springs and Ms. Repking arrived at the school. Officer Lokey was informed of the situation by those present, which included both Ms. Springs, Ms. Repking, and Chantelle Norwood. Officer Lokey was informed that Ms. Springs had an

order of protection against Mr. Springs and Mr. Springs had no legal right to take the child from the school.

14. At the time of this incident, Officer Lokey had information that Thomas Springs was an extremely dangerous and violent felon who presented a clear and present danger to Ms. Springs, Ms. Repking, and Paige Garner. Officer Lokey was specifically told by an adult bystander that Thomas Springs had just stated that he was going to kill Ms. Springs. Mr. Springs was yelling that he was going to kill Ms. Springs in Officer Lokey's presence. It was clearly evident that this was an immediate, present threat and not a future threat to Ms. Springs. It was also very evident that Ms. Springs was terrified of Mr. Springs at that very moment. During this entire time, Mr. Springs was physically present within Officer Lokey's reach. Officer Lokey had the authority, probable cause, duty, and ability to physically arrest Thomas Springs for a violent felony offense, but chose not to do so. Officer Lokey's attitude was so indifferent to the violent threats made by Mr. Springs against Ms. Springs that he was rebuked by Chantelle Norwood for his obvious lack of interest in helping Ms. Springs. It was obvious to everyone that he just did not want to be bothered by the whole situation.

15. Officer Lokey was alarmed to the extent that he told Ms. Springs and Ms. Repking that he would follow behind them in his marked police car when they left the school and traveled back to the

Battered Woman's Shelter. Officer Lokey promised to follow them from the school back to the Battered Woman's Shelter and to protect them from Mr. Springs. Officer Lokey promised to keep them safe.

16. Officer Lokey did follow the vehicle driven by Ms. Repking and occupied by Ms. Springs and Paige Garner. However, contrary to his promise to provide police protection to the occupants of the vehicle, he only followed them a short distance and then drove away. Shortly thereafter, and before the occupants of the vehicle could make other arrangements for personal protection from Mr. Springs, Mr. Springs rammed his vehicle into Ms. Repking's vehicle and caused a serious accident. He then stabbed Ms. Springs to death while all the occupants were still in the disabled vehicle. Ms. Repking and Paige earner thought that they would be stabbed to death at any second. The entire crime scene could only be described as a blood bath.

17. Officer Lokey's acts and omissions in both not arresting Thomas Springs at the school, or at the scene of the traffic accident, and his failure to fulfill his promise of police protection to the occupants of Ms. Repking's vehicle was due to any and all levels of culpability and liability. Both his actions and omissions were due to negligence, gross negligence and deliberate indifference to the legal rights of the occupants of Ms. Repking's vehicle. He had a duty to arrest Thomas Springs before the murder, and he

failed to act. But for Officer Lokey's inaction and omissions, the occupants of Ms. Repking's vehicle would not have been the defenseless victims that they turned out to become on January 21, 2005. Officer Lokey was derelict in his duty, and this was the direct and proximate cause of the vicious murder of Christina Springs, and the aggravated assaults on Kelly Repking and Paige Garner. Had Officer Lokey acted in the way the law commands, Thomas Springs would have been taken into custody for his crimes and would not have been able to intercept the Repking vehicle and murder Christina Springs.

18. Had Officer Lokey followed the Repking vehicle as he promised, and Thomas Springs caused the vehicle accident, Officer Lokey would have been in a position to either arrest Thomas Springs or shoot and immediately kill Thomas Springs before Thomas Springs could attack and murder Christina Springs with a knife. At all times related to this Complaint, Officer Lokey was in possession of a firearm, and he had sufficient skill and ammunition to shoot and kill Thomas Springs at anytime that it became legally necessary to do so.

19. Defendant Randy Reeds' liability is not just in the tact that he was the chief of police on January 21, 2005, but also that he failed in his duty to provide the necessary leadership in making sure that there were in place appropriate procedures, training, and supervision of Officer Lokey in the type of situation faced by Officer Lokey that day. As chief policymaker in the area of law enforcement for the City of Fort

Smith, Arkansas, Chief of Police Randy Reed knew that there was a common pattern, practice, and custom of his police department in allowing unbridled discretion in each police officer as to how to enforce the law and whom to arrest or not arrest.

20. Defendant Reed did not have a policy that any police officer should take all reasonably necessary steps to arrest dangerous violent felons who threaten the immediate death of any person when it is apparent that not taking immediate arrest procedures would lead to the immediate unlawful serious physical injury or death of any person. In this particular situation, Officer Lokey should never have been in a discretionary arrest situation, but a must arrest situation.

21. Both Officer Lokey and Chief Reed knew that citizens would depend on them whenever an officer informed the person that they would receive specific police protection. By promising to follow and protect the occupants of the Repking vehicle and then not following through with that promise of safe protection, both Officer Lokey and Chief Reed should have known that the crimes that were committed by Thomas Springs were foreseeable, imminent, and would most likely result in serious physical injury or death. This is, in part, the "state created danger" theory of liability. Chief Reed did not have a policy that the officers follow through with their specific offers of protection or make specific arrangements with others to provide protection (ie. contact another law enforcement officer or agency), or to provide the

reasonably necessary protection until the potential victims could make other arrangements for their own protection. Both Officer Lokey and Chief Reed deprived the occupants of the Repking vehicle with a last clear chance for survival. The occupants of the Repking vehicle detrimentally relied on the specific promise of safe protection by Officer Lokey.

22. At all times the Defendants acted under color of law as defined by both federal and Arkansas law, 42 U.S.C. 1983, and The Arkansas Civil Rights Act of 1993.

23. As to all causes of action, the law in Arkansas since 1884 has been that a law enforcement officer is required to arrest a person committing a felony without delay. "For when a charge of this high nature [felony] is made to an officer, he is bound to act upon it and pursue and arrest the suspected person at once. . . ." *Carr v. State*, 43 Ark. 99 (1884).

CAUSE OF ACTION #1

24. All of the injuries to the Plaintiffs were done under color of law as defined by Title 42 U.S.C. Sec. 1983. The Defendants acted under color of state laws, statutes, ordinances, regulations, policies, customs, and usage of the State of Arkansas, and the City of Fort Smith, Arkansas, in intentionally, deliberately, and with deliberate indifference violating the Plaintiffs rights under the Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. This was a state created danger type case and the

government, here the City of Fort Smith, also has an affirmative duty to protect its citizens under the Ninth Amendment and the Privileges and Immunities clause of the Fourteenth Amendment. The Plaintiffs, including Christina Springs, Kelly Repking, and Paige Garner were all denied due process of law. The Defendants' actions and omissions in this case "shock the conscience" of the court and the law.

CAUSE OF ACTION #2

25. All of the injuries to the Plaintiffs were done under color of law as defined by the Arkansas Civil Rights Act of 1993. The Defendants acted under color of state laws, statutes, ordinances, regulations, policies, customs, and usage of the State of Arkansas, and the City of Fort Smith, Arkansas, in negligently, intentionally, deliberately, and with deliberate indifference violating the Plaintiffs rights under the entire Arkansas Civil Rights Act of 1993, A.C.A. 16-123-105. and Article 2, Sections 2, 3 & 8 of the Arkansas Constitution. This is a due process violation case as well as a state created danger and a failure to protect case. The Plaintiff's, including Christina Springs, Kelly Repking, and Paige Garner, were all denied due process of law. The Defendants were consciously indifferent to the plight of the Plaintiffs at all times related to the facts of this Complaint.

CAUSE OF ACTION #3

26. Based upon the facts above, the Defendants have violated the Arkansas Wrongful Death Statute, A.C.A 16-62-101 and 102, et seq. Officer Lokey and Chief Reed are liable for not having Thomas Springs arrested in a timely manner and failing to protect Christina Springs after promising to protect her from Thomas Springs. This is a due process violation case as well as a state created danger and a failure to protect case.

CAUSE OF ACTION #4

27. Based upon the facts above, the Defendants have violated the Arkansas Survival Statute, A.C.A 16-62-101 and 102, et seq. Officer Lokey and Chief Reed are liable for not having Thomas Springs arrested in a timely manner and failing to protect Christina Springs after promising to protect her from Thomas Springs. This is a due process violation case as well as a state created danger and a failure to protect case.

CAUSE OF ACTION #5

28. Based upon the facts above, the Defendants have violated the Arkansas Tort claim of Willful and Wanton Conduct. Officer Lokey and Chief Reed are liable for not having Thomas Springs arrested in a timely manner and failing to protect Christina Springs, Kelly Repking, and Paige Garner, after promising to protect them from Thomas Springs. This

is a due process violation type case as well as a state created danger and a failure to protect case.

29. As for all causes of actions listed above, the Defendants knew that their actions were in callous disregard for the safety of Christina Springs, Kelly Repking and Paige Garner; therefore, they are subject to punitive damages.

30. Jury trial demanded.

DEMAND FOR JUDGMENT

31. THEREFORE, the Plaintiffs demand judgment against all Defendants, jointly and severally, and demand the following relief from all the Defendants:

A.) Compensatory damages, including, but not limited to, all damages listed in Arkansas Jury Instruction AMI 2216;

B.) Punitive damages;

C.) Cost of this action;

E.) Necessary and reasonable attorney fees and expenses;

F.) Any and all other relief to which the Plaintiffs are entitled by federal or state law.

GEORGE E. REPKING,
Administrator of the Estate
of Christina Springs, et al.
PLAINTIFFS

BY: /s/ Doug Norwood

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IN THE CIRCUIT COURT OF
SEBASTIAN COUNTY, ARKANSAS
FORT SMITH, ARKANSAS
DIVISION I

GEORGE E. REPKING,
ADMINISTRATOR OF THE ESTATE OF
CHRISTINA SPRINGS, and KELLY REPKING
on behalf of herself and her minor
daughter Paige Garner, PLAINTIFFS

V. No. CV-08-92(1)

BRAD LOKEY and
RANDY REED, each in their
individual and official capacity, DEFENDANTS

AFFIDAVIT OF MS. KELLY REPKING

Before the undersigned notary, Kelly Repking states and alleges as follows:

1. I am the biological daughter of George E. Repking. Christina Repking was my biological sister. My father is married to Monique Repking. Monique Repking is not my or Christina Repking's biological or adoptive mother. Monique Repking had children before she married my father. Her children are Renne Hahn and Stephen Dunn, who are not biological or adoptive children of my father, George E. Repking. They are not in any way heirs of Christina Repking's estate.

2. On the morning of January 21, 2005, I drove my sister Christina Springs to the Sutton Elementary School in Fort Smith, Arkansas, because my niece,

Chantelle Norwood, called my house and told me that Thomas Springs, my brother-in-law, was trying to take the children from the school. My little girl, Paige Garner, was with us.

3. When we arrived, Officer Brad Lokey was already on the scene.

4. Thomas Springs was there and was being disorderly by yelling at Christina Springs and trying to take the children into his custody without lawful authority and contrary to court orders of protection.

5. Stephanie Gordon told Christina Springs, Chantelle Norwood, and myself that she had just personally heard Thomas Springs threaten to kill Christina Springs.

6. I personally informed Officer Lokey that Thomas Springs was a violent convicted felon who had served time in prison for beating Christina Springs. I also told him that we were all afraid of him and his violent nature. It was made perfectly clear to Officer Lokey by Christina, Chantelle and myself, that Thomas Springs had just threatened to kill Christina and we needed immediate police protection.

7. Officer Lokey's initial reaction was indifference. We all continued to insist upon police protection.

8. Officer Lokey was told that Christina Springs was living at the battered woman's shelter nearby. It is about four (4) miles from the school to the shelter. He was told that Christina Springs would need to go

back to the shelter and would need police protection to get there safely.

9. After Christina and I arrived at the school, Officer Lokey was told by Chantelle Norwood that he needed to immediately arrest Thomas Springs for the felony terroristic threat just made against Christina's life. Officer Lokey was completely indifferent to taking any action to arrest or detain Thomas Springs or to make the proper investigation of the threat. He knew that the threat had first been reported by Stephanie Gordon but did not take any arrest action, even though Stephanie Gordon was present the entire time.

10. Finally, Officer Lokey agreed to follow my sister Christina, my little girl Paige, and me back to the battered woman's shelter. It was perfectly clear that he would follow behind us in his marked Fort Smith police cruiser from Sutton Elementary School all the way to the battered woman's shelter. He promised to give us the necessary police protection to get us there safely. He absolutely, with no reservations, told us he would follow us and get us there safely. There was no agreement that he would only follow us a short distance just to see if he saw Thomas Springs following us. He promised full, not temporary, police protection.

11. The plan was to go from the school directly back to the woman's shelter. Officer Lokey did follow for a short distance, and then he abandoned us.

12. After Officer Lokey discontinued following us, my only chance was to try to make it to the battered woman's shelter, just a short drive away. We did not have a cell phone to call for help, and we did not have any weapons to defend ourselves.

13. I continued driving toward the battered woman's shelter, but before we could get there, Thomas Springs hit my car head on. He then got out of his vehicle, came over to my vehicle, and battered my sister Christina while she was still sitting in the front seat of my car. My little girl Paige was also in the car. After beating Christina, he went back to his vehicle, retrieved a knife, and then returned to viciously murder my sister Christina by repeatedly stabbing her with the knife.

14. Just after she was murdered, several bystanders captured Thomas Springs at the murder scene and held him for the police.

15. Had we known that Officer Lokey would not have followed us back to the battered woman's shelter safely, we never would have left the school. We would have taken immediate action to get our own protection from Thomas Springs. We would have gone into the school and used their phone to call the Fort Smith police department to send another officer to the school to help us. If that failed, we would have contacted the Sebastian County Sheriff's Department to get a deputy sheriff to help us. If that failed, we would have gotten my father to bring a gun and take us back to the battered woman's shelter. Under no

circumstances would we have left the school without someone providing security for us. Thomas Springs was a large, mean, convicted felon, and we knew full well that he did not make a hollow threat to kill my sister Christina. On that particular morning, we were all terrified of him.

16. All the allegations contained in the Complaint are true and correct to the best of my knowledge and recollection. All the statutory heirs are listed in the Parties section of the Complaint.

END

/s/ Kelly Repking
Kelly Repking

Subscribed and sworn under oath before me this 1st day of August, 2008.

[SEAL] JODIE DYKES
MY COMMISSION # 12349475
EXPIRES: August 30, 2016
Benton County

/s/ Jodie Dykes
Ms. Jodie Dykes
Notary Public

CERTIFICATE OF SERVICE

I have this date, August 1, 2008, mailed a copy of this pleading/or document to opposing counsel Wyman R. Wade, Jr., PO Box 1446, Fort Smith, Arkansas 72902

/s/ Doug Norwood
Doug Norwood,
Ark Bar No. 87-097

IN THE CIRCUIT COURT OF
SEBASTIAN COUNTY, ARKANSAS
FORT SMITH, ARKANSAS
DIVISION I

GEORGE E. REPKING,
ADMINISTRATOR OF THE ESTATE OF
CHRISTINA SPRINGS, and KELLY REPKING
on behalf of herself and her minor
daughter Paige Garner, PLAINTIFFS

V. No. CV-08-92(1)

BRAD LOKEY and
RANDY REED, each in their
individual and official capacity, DEFENDANTS

AFFIDAVIT OF MS. CHANTELLE NORWOOD

Before the undersigned notary, Chantelle Norwood states and alleges as follows:

1. I am the biological daughter of Christina Springs. George E. Repking is my biological grandfather on my mother's side of the family. I am over 18 years of age. My new married last name is Norwood.

2. On the morning of January 21, 2005, I took my little brothers to Sutton Elementary School in Fort Smith, Arkansas. My biological father Thomas Springs came to the school and attempted to take the children from the school. I called the police and my aunt, Kelly Repking.

3. Officer Brad Lokey of the Fort Smith Police Department came to the school and prevented my father from taking the children.

4. My aunt Kelly and my mother arrived shortly in Kelly's car.

5. My father was enraged that my mother was at the school trying to make sure that her court orders of protection against him on behalf of herself and the boys were enforced by the police. He created quite a scene with his yelling and cussing.

6. Stephanie Gordon told Christina Springs, Kelly Repking, and myself that she had just personally heard Thomas Springs threatening to kill my mother Christina Springs.

7. I personally informed Officer Lokey that Thomas Springs was a violent convicted felon who had served time in prison for beating Christina Springs. I also told him that we were all afraid of him and his violent nature. It was made abundantly clear to Officer Lokey by Christina, Kelly, and myself, that Thomas Springs had just threatened killing Christina and we needed immediate police protection.

8. Officer Lokey's initial reaction was indifference. We all continued to insist upon police protection.

9. Officer Lokey was told that Christina Springs was living at the battered woman's shelter nearby. He was told that Christina Springs would need to go

back to the shelter and would need police protection to get there safely.

10. After Christina and Kelly arrived at the school, I told Officer Lokey that he needed to immediately arrest Thomas Springs for the felony terroristic threat just made against Christina's life. Officer Lokey was completely indifferent to taking any action to arrest or detain Thomas Springs, or to make the proper investigation of the threat. He knew that the threat had first been reported by Stephanie Gordon, but did not take any arrest action, even though Stephanie Gordon was present the entire time.

11. Finally, Officer Lokey agreed to follow Christina and Kelly back to the battered woman's shelter. It was perfectly clear that he would follow behind them in his marked Fort Smith police cruiser from Sutton Elementary School all the way to the battered woman's shelter. He promised to give them the necessary police protection to get them there safely. He absolutely, with no reservations, told them that he would follow them and get them there safely. There was no agreement that he would only follow them a short distance just to see if he saw Thomas Springs following behind them. He promised full, not temporary, police protection.

12. The plan was to go from the school directly back to the woman's shelter.

13. My mother had been staying in the battered woman's shelter since December 2004. My mother was so frightened of Thomas Springs that she asked

me on several occasions to park in the alley near the battered woman's shelter to watch and make sure that she safely made it from the safe house into the shelter. She always feared that Thomas Springs would be waiting in the alley to harm her. She took very special care not to let Thomas Springs find out how and when she went to the shelter when she was with me.

14. My mother was absolutely terrified of my father. He was very physically abusive from toward her, and he was clearly dangerous.

15. Once my mother was told, in my presence, that Stephanie Gordon reported that my father had threatened to kill my mother, my mother would never have left the school without protection from him.

16. I was absolutely shocked at how indifferent Officer Lokey was over the entire incident. His attitude was that he just didn't want to mess with the whole situation, and he could not care less that my father had just threatened to kill my mother.

END

/s/ Chantelle Norwood
Chantelle Norwood

Subscribed and sworn under oath before me this 1st day of August, 2008.

[SEAL] JODIE DYKES
MY COMMISSION # 12349475
EXPIRES: August 30, 2016
Benton County

/s/ Jodie Dykes
Ms. Jodie Dykes
Notary Public

CERTIFICATE OF SERVICE

I have this date, August 1, 2008, mailed a copy of this pleading/or document to opposing counsel Wyman R. Wade, Jr., PO Box 1446, Fort Smith, Arkansas 72902

/s/ Doug Norwood
Doug Norwood,
Ark Bar No. 87-097

No. 10-860

FILED
JAN 19 2011

In The
Supreme Court of the United States

GEORGE REPKING, ADMINISTRATOR OF THE ESTATE OF CHRISTINA SPRINGS, and KELLY REPKING, on behalf of herself and her minor daughter, P.G.,

Petitioners,

v.

BRAD LOKEY and RANDY REED,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF OF RESPONDENTS, BRAD LOKEY AND RANDY REED, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition, where the Arkansas Supreme Court's thorough analysis of the material facts does not conflict with a decision of this Court and is consistent with the analysis applied by the several Courts of Appeals, and where the Arkansas Supreme Court's ruling does not implicate an important federal question that has not been settled by this Court.

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STATEMENT OF THE CASE

Christina Springs was murdered by her husband, Thomas Springs, on a busy city street in front of scores of witnesses. (Pet. App. 3). Petitioners, who are relatives of Christina Springs, filed this action below, asserting that Respondents, Fort Smith Police Officer Brad Lokey and Fort Smith Police Chief Randy Reed, individually and officially, were liable for that death. Among several causes of action put forth by Petitioners was a claim that police failure to protect Christina Springs from that murder constituted a "state-created danger" thus violating substantive Due Process. Presently, Petitioners argue that the Arkansas Supreme Court, in analyzing that 42 U.S.C. § 1983 cause of action, erroneously relied on the 8th Circuit Court of Appeals' announced standard of review in cases involving claims of a "state-created danger." That standard of review was set forth in *Hart v. City of Little Rock*, 432 F.3d 801 (8th Cir. 2005).

In reviewing the trial court's grant of summary judgment to Respondents, the Arkansas Supreme Court first found that simple negligence would not suffice to support a claim of violation of substantive Due Process. (Pet. App. 8, *citing Daniels v. Williams*, 404 U.S. 327, 328 (1986)). Then, the Arkansas Supreme Court, *quoting* from *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989), recognized that nothing in the language of the Due Process Clause itself requires a law enforcement officer to protect the life, liberty, and property of

citizens against invasion by private actors such as Thomas Springs. (Pet. App. 8).

Finding that Police Chief Reed had no personal involvement in the incident, the Arkansas Supreme Court next looked at the facts surrounding Officer Lokey's involvement. The Court noted that when he went to the elementary school in response to a call that Thomas Springs was wrongfully trying to pick up one of his children, Officer Lokey was faced with three different no-contact court orders, the most recent of which noticeably did not include any reference to the children. (Pet. App. 2). The Arkansas Supreme Court found that Lokey was unable, though he tried, to confirm which, if any, of the orders was in effect; was only aware through second-hand information that Mr. Springs might have threatened his wife; did not observe any criminal activity by Mr. Springs; and, found that Officer Lokey was under no affirmative duty to aid or protect Christina Springs from a private act of violence under the Due Process Clause. (Pet. App. 2 & 10).

The Arkansas Supreme Court then acknowledged that it recognized an exception to the absence of an affirmative right to safety under the Due Process Clause, namely, the so-called "state-created danger exception." However, the Arkansas Supreme Court said that for such a duty to protect to arise, the actions of a state actor must create a unique risk of harm to that person that is greater than the risk faced by the general public. (Pet. App. 11, *citing Davis*

v. Fulton County, Ark., 90 F.3d 1346, 1351 (8th Cir. 1996)).

The Arkansas Supreme Court further acknowledged that Petitioners opined that the Court should be using a standard of review of a "state-created danger" claim utilized by the 9th Circuit Court of Appeals, as opposed to a five step test used by the 8th Circuit in *Hart*, *supra*, which includes a "shock the conscience element." (Pet. App. 12). The Arkansas Supreme Court held that the five step test used by the 8th Circuit was the more appropriate test. In so finding, the Arkansas Supreme Court held:

> . . . Officer Lokey's actions regarding Christina's [Springs] safety, even accepting all of the facts in favor of appellants, did not exhibit deliberate indifference to her plight so as to implicate due-process concerns. Stated differently, we fail to see a genuine issue of material fact that has been presented that Officer Lokey's conduct put Christina at significant risk of serious, immediate, and proximate harm and that he acted recklessly in conscious disregard of the risk so as to shock our conscience.

(Pet. App. 12). The Arkansas Supreme Court affirmed the trial court's grant of summary judgment. Petitioners' Petition for Writ of Certiorari ensued.

ARGUMENT

Respondents, Brad Lokey and Randy Reed ("Lokey" and "Reed"), respectfully suggest the Petition

for Writ of Certiorari should be denied. Petitioners' argument that a split exists in the circuits (8th and 9th Circuits) on the standard of review used in cases involving alleged "state-created danger" is not sufficient to justify review by this Court. That "split" between two circuits (when in fact all eleven circuits as well as the D.C. Circuit adhere to an analysis that includes "shocks the conscience" or a form of it – an approved standard previously articulated by this Court in Due Process cases) is insufficient to warrant the requested review in this case. This is particularly true in light of the Arkansas Supreme Court's holding that whether it reviewed the facts in favor of Petitioners with a "deliberate indifference" standard or an "intent to harm" standard under the "shocks the conscience" analysis, the grant of summary judgment in favor of Lokey and Reed was correct.

I. THIS COURT SHOULD DENY PETITIONERS' PETITION FOR WRIT OF CERTIORARI BECAUSE THE ALLEGED SPLIT BETWEEN THE CIRCUITS AS TO STANDARD OF REVIEW FOR "STATE-CREATED DANGER" CASES IS, IF A SPLIT EXISTS, *DE MINIMIS*.

Petitioners have asked for a Writ of Certiorari because of a perceived "direct conflict between the tests used by the Eighth and Ninth Circuits" in judicial analysis of a state-created danger claim. To the contrary, Respondents urge that the alleged split is a false or non-existent split or is *de minimis*. This case

does not involve an unsettled question of federal constitutional law of general interest.

This Court, in *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189, 195 (1989) stated, "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." Generally, the Due Process Clause does not provide an affirmative right to government aid, "even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 196.

As Petitioners correctly note, subsequent to *DeShaney*, a majority of circuit courts of appeals have recognized an exception where there has been a "state-created danger." The Arkansas Supreme Court analyzed Petitioners' claims on appeal in light of that exception. (Pet. App. 11). Though the Arkansas Supreme Court thoroughly reviewed the material facts to determine whether the state-created danger exception had been satisfied, Petitioners urge that the Arkansas Supreme Court should not have used a standard of review that includes "shocks the conscience." To the contrary, such a proposition, if accepted, would undermine this Court's holding in *DeShaney*, *supra*. That is, Petitioners seem to be prompting this Court to overrule *DeShaney* by creating a new standard, rather than recognizing that all appellate circuits already use the "shocks the conscience" test, or a form of it, to determine if there has been "deliberate indifference" or "intent to harm" in analyzing a

"state-created danger" claim. Petitioners seem to be asking that the "shocks the conscience" element be discarded – a standard that has been used for over half a century in analyzing substantive Due Process claims. *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *citing Rochin v. California*, 342 U.S. 165, 172-73 (1951); *Breithampt v. Abrams*, 352 U.S. 432, 435 (1957); *Whitley v. Albers*, 475 U.S. 312, 327 (1986); *United States v. Salerno*, 481 U.S. 739, 746 (1987); and *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992).

In the wake of *DeShaney*, the theory of a state-created danger exception has been litigated in a variety of contexts, including those involving motorists and passengers, government and citizen undercover operatives, rescues by third parties and prevention of rescues, failure to arrest, and failure to serve orders. Despite Petitioners' claim, the difference in analysis by the several circuits is not the huge gulf Petitioners maintain. A circuit-by-circuit examination reveals that the test used by the several circuits to analyze state-created danger claims does not differ to the degree claimed by Petitioners. That is, the analysis of such claims may use somewhat differing language, *e.g.*, "conscience shocking"; "egregious"; "outrageous"; "willful disregard"; "deliberate indifference"; or "subjective recklessness," but all recognize that liability can only exist where an individual has been left in a more dangerous situation than the one in which they found themselves by an officer *creating* a previously non-existing danger or actually *increasing* the danger.

The following examples demonstrate Respondents' point:

- *1st Circuit* (In affirming a motion to dismiss a plaintiff's claim under the "shocks the conscience" exception, the 1st Circuit held that while "unkept promises [by State actors] may have rendered [a decedent] more vulnerable to the danger posed . . . merely rendering a person more vulnerable to risk does not create a constitutional duty to protect." *Rivera v. Rhode Island*, 402 F.3d 27 (1st Cir. 2005)). In fact, the 1st Circuit in *Rivera*, 402 F.3d at 38, found *DeShaney* indistinguishable from the claims alleged in the *Rivera* case:

  > Ultimately, the claims alleged in the Complaint are indistinguishable from those in *DeShaney*. The allegation that [the decedent] trusted the State to do what it said and relied on that promise . . . is not materially different from *DeShaney*, where the State was aware of the risk, by its actions expressed promises of help, and then failed to protect a young boy from his abusive father.

- *2nd Circuit* (In *Lombardi v. Whitman*, 485 F.3d 73 (2nd Cir. 2007), the 2nd Circuit held that state actors providing knowingly inaccurate information, which turned out to be tragically consequential to plaintiffs, was not so "deliberately

indifferent" that the misrepresentation "shocked the conscience" of the Court. The 2nd Circuit considered, and found wanting, the fact that federal officials had made "reassuring – and knowingly false" – announcements about air quality in lower Manhattan following the 9/11 catastrophe, to the detriment of the plaintiffs.)

- *3rd Circuit* (The 3rd Circuit adopted the state-created danger exception in *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996). Later, in *Sanford v. Stiles*, 456 F.3d 298 (3rd Cir. 2006), the 3rd Circuit held that in *any* state-created danger case, under any set of facts or theory, the State actor's behavior must *always* "shock the conscience." *Id.* at 310. *Sanford* affirmed the District Court's grant of summary judgment where a 16-year-old high school student killed himself after his threat to do so was disclosed to the school's guidance counselor who had met with the decedent twice before the student took his own life, and, as alleged, acted "deliberately indifferent" to the student's problems.)

- *4th Circuit* (In reversing a District Court's judgment, the 4th Circuit held there was no Due Process right to protection from third parties based on mere assurances by State officials under an alleged state-created danger theory of

Section 1983 liability. *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995).)

- *5th Circuit* (The 5th Circuit apparently refuses to adopt a state-created danger theory exception to Section 1983 liability. *See, e.g., Longoria v. Texas*, 473 F.3d 586, 593 n.8 (5th Cir. 2006). In *McClendon v. City of Columbia*, 305 F.3d 314, 324 (5th Cir. 2002) (*en banc*) (*per curiam*), the 5th Circuit held that "neither this court nor the Supreme Court has yet determined whether a citizen has a constitutional right to be free from state-created dangers" and, because the plaintiff failed to establish the necessary elements of the theory, it would not apply even if available.)

- *6th Circuit* (The 6th Circuit, in *McQueen v. Beecher Community Schools*, 433 F.3d 460, 464 (6th Cir. 2006), recognized a state-created danger exception. In doing so, it held that to demonstrate the exception requires a showing of an affirmative act that creates or increases a risk that is a special danger to the victim as distinguished from the public at large as well as a showing of a requisite degree of state culpability, namely – deliberate indifference, which means "subjective recklessness" – that "shocks the conscience.")

- *7th Circuit* (In *Bublitz v. Cottey*, 327 F.3d 485 (7th Cir. 2003), the 7th Circuit,

in construing whether the "shocks the conscience" test *or* a "deliberate indifference" standard is an appropriate benchmark by which to determine if a police officer's conduct violates substantive Due Process, held that a police officer's opportunity to deliberate for several minutes is not tantamount to "deliberate indifference" to the point of "shocking the conscience." Comparable to the determination of the Arkansas Supreme Court in the case at hand, the Seventh Circuit held "we need not choose between the two formulations of the constitutional standard (even assuming they present different inquiries), as we believe that [the plaintiff] has not presented facts which rise to either level." *Id.* at 490-91.)

- *8th Circuit* (In *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir. 2005), the 8th Circuit held "under the State-created danger theory, [Plaintiffs] must prove (1) they were members of a limited, precisely definable group; (2) [the City's] conduct put them at significant risk of serious, immediate, and proximate harm; (3) the risk was obvious or known to [the City]; (4) [the City] acted recklessly in conscience disregard of the risk, and (5) in total, the City of Little Rock's conduct shocked the judicial conscience.")) Like the decisions of other circuits considering the issue, the 8th

Circuit's analysis turns upon the standard of "shocks the conscience."

- *9th Circuit* (In *Porter v. Osborne*, 546 F.3d 1131 (9th Cir. 2008), the 9th Circuit specifically identified and explained the standard of culpability for review of a Due Process claim based on a state-created danger exception.) Just as in the Petitioner's instant Petition for Writ of Certiorari, the parties in *Porter* mistakenly suggested to the 9th Circuit that the choice of analysis of a state-created danger exception to municipal liability is between "shocks the conscience" and "deliberate indifference," when, in fact, the 9th Circuit specifically holds the latter query is merely a subset of the former. *Porter* recognized that the U.S. Supreme Court has made it clear that only official conduct that "shocks the conscience," under either an "intent to harm" theory or a "deliberate indifference" theory is cognizable as a Due Process violation. *Id. citing County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (*citing Rochin v. California*, 342 U.S. 165, 172-73, 72 S. Ct. 205, 96 L. Ed. 183 (1952).)

- *10th Circuit* (In *Green v. Post*, 574 F.3d 1294 (10th Cir. 2009), a case arising out of a car collision wherein an individual was killed when his vehicle was struck by a car driven by a deputy sheriff, the

10th Circuit, in construing a state-created danger exception, relied upon the 7th Circuit's holding in *Bublitz v. Cottey*, *supra*, and recognized that "to rise to the level of a constitutional violation, a deliberately indifferent act must be one which is conscience shocking." The 10th Circuit concluded that the deputy's conduct failed to meet the deliberate indifference standard, finding that his actions did not "demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking" even under a "deliberate indifference" standard.)

- *11th Circuit* (In *Waddell v. Hendry County Sheriff's Office*, 329 F.3d 1300 (11th Cir. 2003), the 11th Circuit held, in recognizing a state-created danger exception, that "even conduct by a government actor that would amount to an intentional tort under state law will rise to the level of a substantive due process violation only if it also 'shocks the conscience.'" *Id.* at 1305, *quoting Dacosta v. Nwachukwa*, 304 F.3d 1045, 1048 (11th Cir. 2002). Further, the 11th Circuit, in *Waddell*, relying on *County of Sacramento v. Lewis*, *supra*, held that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Lewis*, 118 S. Ct. 1716 (1998).)

- *D.C. Circuit* (The D.C. Circuit applies a shocks the conscience standard in

> analyzing a state-created danger exception claim. In *Smith v. District of Columbia*, 413 F.3d 86, 93 (D.C. Cir. 2005), the D.C. Circuit held "deliberate indifference will not violate due process where the state has no 'heightened responsibility toward the individual,'" *citing Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001). In the D.C. Circuit, only a state actor's "conscience shocking" conduct under a "deliberate indifference" standard will afford a cause of action under the state-created danger exception for alleged violation of substantive Due Process.)

The circuit-by-circuit review outlined above shows that the several circuits that have recognized a state-created danger exception to the otherwise non-existent duty of a governmental actor, under Due Process standards, to protect an individual citizen, all uniformly require some extreme conduct on the part of the police officer. The officer must have actually created the danger or been so cognizant of the danger that they "deliberately" or "willfully" or "egregiously" or "outrageously" ignored the then existing situation, to such an extreme that the judicial conscience is shocked. The bar for demonstrating a violation of substantive Due Process has intentionally been set high by the courts.

In the case at bar, the Arkansas Supreme Court correctly found that Officer Lokey's actions regarding

Ms. Springs' safety "even accepting all of the facts in favor of the appellants, did not exhibit deliberate indifference to her plight so as to implicate due-process concerns. . . . [There was not] a genuine issue of material fact . . . presented that Officer Lokey's conduct put Christina at significant risk of serious, immediate, and proximate harm and that he acted recklessly in conscious disregard of the risk so as to shock our conscience." (Pet. App. 12).

Even the concurring justice in the case below, while agreeing with Petitioners that the "shocks the conscience" element ought to be dropped in analyzing an alleged state-created danger claim, did agree with the majority that "Officer Lokey's conduct did not put Christina at significant risk of serious, immediate, and proximate harm." (Pet. App. 18).

Thus, while Respondents contend the Petition for Writ of Certiorari should not be granted because the alleged lack of uniformity between the circuits is either non-existent or, at most, only a minor difference of semantics as to the analysis to be applied, Respondents also urge that the facts of this particular case do not elevate it to the level that the Petition for Writ of Certiorari should be granted.

CONCLUSION

Respondents respectfully suggest the Petition for Writ of Certiorari should be denied. The reason

asserted for review by this Court is a perceived split between a couple of circuits on the standard of review of a claim of "state-created danger." In requesting review, Petitioners refer to the fact that a single circuit, the 9th Circuit Court of Appeals, does not use "shocks the conscience" as an element of that review. Juxtaposed are all of the other circuits, and a 2008 9th Circuit holding deciding the very issue Petitioners now urge, wherein "shocks the conscience," or a form of it, is the standard of review in such cases. Respondents opine that the perceived conflict is actually a false conflict. However, should it be determined that a conflict does exist between the circuits, that conflict should not, under the facts of this case, be significant enough to prompt review by this Court.

Petitioners also urge that the alleged "promise" by Officer Lokey to provide protection to Christina Springs makes this case unique and thus worthy of review. Several of the cases referenced above suggest that myriad cases involving alleged governmental "promises" have been deliberated already and that uniqueness is not present here. Furthermore, inasmuch as every Due Process claim might be said to have its own unique set of facts, adhering to Petitioners' argument would of necessity dictate review of every case by this Court. That is a *non sequitur*.

For all these reasons, Respondents, Brad Lokey and Randy Reed, respectfully request that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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